IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE P.R.RAMAN

THURSDAY, THE 24TH MAY 2007 / 3RD JYAISHTA 1929

OP.No. 9615 of 2003(T)

PETITIONER:

M/S.FACT EMPLOYEES CO-OPERATIVE CONSUMER STORES NO.E-285, AMBALAMEDU P.O., REPRESENTED BY G.VIJAYAN NAIR, S/O. LATE E.P.GOPALA PILLAI, RESIDING AT NAVANEETHAM, TRIPUNITHURA, ITS SECRETARY.

BY ADV. DR.K.B.MUHAMED KUTTY (SR.)

RESPONDENTS:

1. THE INTELLIGENCE OFFICER, SQUAD NO.I, COMMERCIAL TAXES, ERNAKULAM.

2. THE COMMISSIONER OF COMMERCIAL TAXES, PUBLIC BUILDINGS, THIRUVANANTHAPURAM.

3. DEPUTY TAHSILDAR (REVENUE RECOVERY), ALUVA.

BY GOVERNMENT PLEADER SRI GOVINDAN

THIS ORIGINAL PETITION HAVING BEEN FINALLY HEARD ON 24/05/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

ORDER ON CMP.NO.16715/2003 IN OP.NO.9615/2003

Dismissed

24/5/2007 Sd/- P.R.RAMAN, JUDGE

APPENDIX

PETITIONER'S EXTS:

EXT.P1	TRUE COPY OF PENALTY ORDER FOR 96-97 U/S.45A OF THE KGST ACT, PASSED BY THE IST RESPONDENT DTD. 14/5/2001.
EXT.P2	TRUE COPY OF THE PENALTY ORDER FOR 97-98; U/S.45 OF THE KGST ACT, PASSED BY THE IST REDSPONDENT DTD. 14/5/2001.
EXT.P3	TRUE COPY OF THE FIRST REVISION ORDER FOR 96-97 AND 97-98 PASSED BY DY.COMMR., MATTANCHERRY, DTD. 24/10/2001.
EXT.P4	TRUE COPY OF COMMON REVISION ORDER FOR 96-97 & 97-98 PASSED BY THE 2ND RESPONDENT DTD. 25/11/2002.
EXT.P5	TRUE COPY OF GROUNDS OF REVISION SUBMITTED BY THE PETITIONER TO 2ND RESPONDENT DTD. 3/12/2001 FOR THE YEAR 1996-97.
EXT.P6	TRUE COPY OF GROUNDS OF REVISION SUBMITTED BY THE PETITIONER TO 2ND RESPONDENT DTD. 3/12/2001 FOR THE YEAR 1997-98.

P.R.RAMAN, J.

O.P.NO.9615 OF 2003

Dated this the 24th day of May, 2007

JUDGMENT

Petitioner is an Employees Co-operative Consumer Society headed by its Secretary. First respondent is the Intelligence Officer, Commercial Taxes, Ernakulam, second respondent is the Commissioner of Commercial Taxes, Thiruvananthapuram and the 3rd respondent is the Deputy Tahsildar (Revenue Recovery). The matter relates to an imposition of penalty under Section 45-A of the K.G.S.T. Act on the petitioner. The Intelligence Squad inspected the business premises of the petitioner on 18/1/2000 and prepared a shop inspection report. Certain records relating to the inter-state purchase of plastic moulded chairs were recovered during the inspection. 7290 numbers of moulded chairs alleged to have been purchased during the year 1996-97 and 1997-98. Accounts were called for and verified. The representatives agreed the above purchase; but were not returned by the dealer nor remitted the tax. The dealer contended that they have purchased the above furniture for distribution among the workers of FACT at the cost price as a service. It was their case that the FACT Management announced that as a mark of record performance of the employees and to commemorate

the record production, the employees will be given a memento during the year. This was announced in the Circulars issued by the Management on 30/9/1996 and 10/10/1996. These Circulars were seen produced before the Deputy Commissioner. As per these Circulars, the employees had been given options for selection of the articles at concessional rates. The Society was entrusted with the work of supply of the memento. According to the petitioner, as per the instruction from the FACT Management, the Secretary of the Society placed an order to the Blow Plast, Cochin for supply of the articles and payments effected to them by demand drafts. But the Intelligence Officer did not accept this explanation. It was found that the petitioner did not place any order to the Blow Plast, Cochin. On the other hand, the enquiry revealed that when the goods reached at Manjeri check post, the same was detained and the petitioner admitted that a certificate was issued so as to enable them for delivery of the articles on behalf of the petitioner. Though it was the case of the Intelligence Officer that the petitioner did not account this transaction, it was contended that they have gone through the accounts and it is only from the accounts that the Intelligence Squad came to the conclusion that these amounts were not disclosed in the return subsequently filed. For suppression of the turnover representing this transaction in the returns filed by the assessee,

the Intelligence Officer imposed a penalty double the tax by Ext.P1 and P2 order for the years 1996-1997 and 1997-98 respectively. As per Ext.P1 an amount of Rs.2,25, 374/- was imposed under Section 45A (b) and (d) of the K.G.S.T. Act and for the subsequent year an amount of Rs.3,88,800/- was imposed. Aggrieved thereby the petitioner preferred a revision before the Deputy Commissioner of Commercial Taxes reiterating the contentions. It was specifically urged that the distribution of the memento was effected by the Society, that the collection of the amount and the payment effected to VIP Blow Plast, Cochin were recorded in the books of accounts of the Society. It is also contended that certificate was obtained by the petitioner, as required by the VIP Blow Plast, Cochin, for production before the check-post authorities to get release of the goods, which was detained at the check-post and that fact itself is not a reason to impute the guilt on the part of the petitioner. According to the petitioner, there was no deliberate attempt on his part to act nor was he guilty of any contumacious conduct. He also did not act dishonestly or show disregard of his obligation. It was contended that in the factual situation no penalty could have been imposed. The Deputy Commissioner found that the petitioner did not produce any evidence to prove that they have placed orders on Blow Plast Ltd., Cochin. On the

contrary Blow Plast Ltd., Cochin forwarded a copy of the purchase order placed by the petitioner on VIP Industries, Sinnar, Nasik for the supply of furniture. From the seized record, the Intelligence Officer came to the conclusion that the inter-state purchase of moulded chairs are from VIP Industries, Sinnar, Nasik and the kitchen stands are from Omega Industries, Silvasa. Both these interest-State purchases were not accounted by the applicant. Subsequent sales were also not disclosed in the returns filed. In those situation, the Deputy Commissioner came to the conclusion that the applicant has failed to account the purchases of moulded chairs and kitchen stands during the year 1996-97 and 1997-98 and to furnish in the returns the sales of the above goods during the respective years. Therefore, it was held that the Intelligence Officer is perfectly justified in imposing penalty. However, regarding the quantum he reduced it to Rs.56,344/- and Rs.97,000/- respectively for the year 1996-97 and 1997-98. Thus, substantial relief was granted to the petitioner. Dissatisfied with the relief as granted by the Deputy Commissioner, the petitioner filed second revision before the Commissioner of Commercial Taxes, Thiruvananthapuram, who by Ext.P4 order confirmed the order of the Deputy Commissioner and dismissed the revision, against which the present original petition is filed.

2. In the order Ext.P4 the Commissioner of Commercial Taxes also stated that there is no dispute that the details of transaction were not disclosed in the return filed before the Assessing Authority. If the petitioner had been under the bona fide belief that the transactions are exempted from tax, the proper course of action would have been to disclose the amounts in the return and claim exemption. Hence, it is found that the petitioner did not substantiate his contentions and as regards the quantum of penalty, the first revisional authority having already granted sufficient relief, did not think it fit to further reduce the amount of penalty. It was on these reasons that the revision was dismissed.

3. The learned senior counsel Sri K.B. Mohamed Kutty appearing for the petitioner inter alia contented that being a penalty proceeding, which is a quasi-criminal in nature, and in the absence of any contumacious conduct on the part of the assessee in not disclosing the amount covered by the transaction in the return filed by them, imposition of penalty is not warranted. According to him, the transactions were properly accounted in the account books and it is only based on the account that the Intelligence Squad inferred about the suppression made in the return. It is true that in the return filed the assessee did not disclose the amount covered by the transaction in question. But according to him,

the petitioner was under the bona fide belief that he is only a second seller within the State, as the purchases were made from M/s. Blow Plast Ltd., Cochin in which event there is no liability in the hands of the assessee-petitioner. He also placed reliance on the fact that amounts were paid by demand draft to Blow Plast, Cochin, that certificate obtained by him was based on the request made by the Blow Blast, Cochin and that the goods were purchased for distributing the same to the employees as a memento as declared by the FACT.

4. In those circumstances, he contends that there is no justification for imposing such huge amounts by way of penalty as imposed by the Deputy Commissioner and confirmed by the Commissioner of Commercial Taxes. He also placed reliance on the two decisions of the Apex Court in **Hindustan Steel Ltd. v. State of Orissa ((1970) 25 STC 211 (SC)** and **The Cement Marketing Co. of India Ltd. v. The Asst. Commissioner of Sales Tax, Indore and others ((1980) 45 STC 197 (SC))** in support of his contention that the return cannot be said to be false merely because there was a non-disclosure of any amount in the return filed.

5. Per contra the learned Government Pleader would contend that

the assessee in this case did not produce any material to show that the amounts were paid to Blow Plast, Cochin. On the other hand, as disclosed in the facts, the order itself was placed by the assessee to VIP Industries, Sinnar, Nasik and not to the Blow Plast, Cochin. The goods were received from Nasik and it is only based on the certificate issued by the assessee that the goods got released by the check-post authorities which would have put the assessee on notice that the transaction is one of inter-state in nature and if it was an intra-state, there would have been no need or necessity to give any certificate, because he is a dealer, who purchased the goods. His liability is to procure the goods and supply the same. He also submitted that sufficient relief has been granted by the Deputy Commissioner, the first revisional authority, and the order of the Commissioner confirming the order of the Deputy Commissioner cannot be said to be perverse, unreasonable and illegal. In the absence of any error apparent on the face of the record, it is submitted that no interference is called for under Article 226 of the Constitution of India.

6. Heard both sides.

7. It is true that the penalty is a quasi-criminal in nature, there would be an element of contumacious conduct on the part of the assessee for imposition of penalty as held by the Apex Court in the aforesaid two

decisions. But it is always a question of fact as to whether there is any contumacious conduct on the part of the assessee in not disclosing the amount covered by the transaction in question in the return filed. In this case the assessee did not disclose the transaction in the return filed and claim exemption. So whether he reasonably thought that he is only a second seller within the State has to be gathered from the factual situation. Even though the assessee would contend that he has placed an order to the Blow Plast, Cochin, the order itself shows that it was placed with the party at Nasik. When the purchase order itself is placed with a dealer outside the State, the petitioner could not thereafter contend that the supplier is a dealer within the State. Further when the goods reached the check-post at Manjeri, the necessity of producing a certificate from the petitioner arose, which is an eye opener to the petitioner that it is only an inter-state purchase and not intra-state purchase. Thirdly, the petitioner did not produce any evidence to show that drafts were taken in the name of Blow Plast, Cochin. Even though the petitioner has a contention that he has accounted the transaction, the fact remains that he has not disclosed the same in the return filed.

8. Having due regard to the factual situation in the case, what at best could have been done is to reduce the penalty. The Deputy

Commissioner, the first Revisional Authority, has reduced the amount considerably and fixed the penalty at half the tax payable on the transaction in question. The Commissioner did not reduce it further. It cannot be said in the factual situation that the non-interference of the Commissioner of Commercial Taxes give rise to any error apparent on the face of the record. The Deputy Commissioner was also perfectly justified in finding that this is a fit case where the penalty could be imposed. However, leniency has been shown and penalty has been reduced to half the amount of tax.

9. In the limited jurisdiction under Article 226 of the Constitution of India, I do not think this is a fit case where any further relief could be granted.

Original Petition is accordingly dismissed.

P.R.RAMAN,
Judge.

kcv.

P.R.RAMAN, J.

O.P.NO.9615 OF 1999

JUDGMENT

24th May,2007